

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7152
~~75-7121~~

ORIGINAL

In The
United States Court of Appeals

For The Second Circuit

MARION ROSETTE,

Plaintiff-Appellee,

vs.

RAINBO RECORD MANUFACTURING CORPORATION
and HAROLD E. MARKOWITZ AND JACK BROWN, doing
business as RAINBO RECORD COMPANY, a partnership,

Defendants-Appellants.

*On Appeal from the United States District Court for the
Southern District of New York*

BRIEF FOR DEFENDANTS-APPELLANTS

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Defendants-Appellants.

BRIEF FOR APPELLANTS

This is an appeal from a judgment rendered by District Judge Murray I. Gurfein filed January 1, 1975, which judgment held appellants liable for copyright infringements to plaintiff in the amount of \$14,300 with interest from July 1, 1964, together with attorney's fees, costs and disbursements, the opinion is reported in 354 F. Supp. 1183 (S.D.N.Y. 1973).

ARGUMENT

STATEMENT

Rainbo Record Manufacturing Corporation and Harold E. Markowitz and Jack Brown doing business as Rainbo Record Company, defendants-appellants, appeal from a judgment in favor of plaintiff-appellee, Marion Rosette, entered February 4, 1975, after a trial without a jury before the Hon. Murray I. Gurfein on October 10th and 11th, 1972 and a hearing to determine damages before Magistrate Martin D. Jacobs on January 30th and 31st, 1974.

This action was commenced by Marion Rosette on November 15, 1966, to recover for alleged infringement of statutory and common-law copyrights. Plaintiff in her 42 court complaint charged that the defendants infringed her copyrights by manufacturing and selling records containing thirty-three musical compositions. Defendants denied that they have infringed plaintiff's alleged statutory or common-law copyrights. As affirmative defenses defendants contended that the compositions referred to in the complaint are in the public domain and that the action was not commenced within three years after the causes of action accrued and are barred by the statute of limitations as set forth in Section 214 of the Civil Practice Law & Rules.

1.
At trial defendants formally moved^{1.} to amend the answer to set up additional affirmative defenses which were based in large part upon newly discovered evidence, (78a-83a)^{2.} The trial judge granted defendants' motion with respect to the first, second, third, sixth, seventh and ninth defenses because each was related in some way to the original answer, but the judge denied the addition of the fourth, fifth, eighth, tenth and eleventh defenses, (88a-89a). Those defenses were based upon a claim of title in opposition to plaintiff's and were not allowed, according to Judge Gurfein, because to do so would prejudice plaintiff, (90a).

Judge Gurfein, in his opinion filed February 27, 1973, found as a fact that there was infringement of plaintiff's compositions by the defendants, Opinion 11; (355a).

1. Defendants' Counsel Arnold I. Rich was retained on August 25th and wrote to Judge Gurfein on September 15, 1972, 25 days before trial requesting leave to amend the answer. Mr. Rich stated that his office was recently substituted as attorney for defendants and that he had had no opportunity to conduct discovery. He had acquired new information which challenges plaintiff's title to the compositions at issue. Enclosed in the letter were the proposed amended answer, (67a) proposed findings of fact and conclusions of law and an amended memorandum of law. Copies of the letter and enclosures were served upon counsel for plaintiff. Mr. Rich received no reply from Judge Gurfein on this matter.

2. () Numerical reference with letter "a" refers to page in Appellant's Appendix.

The finding of infringement was based upon the Court's findings of fact that Rainbo Record Manufacturing Corporation, a phonograph record presser, was closely related to Lyric Records, a manufacturer of records and a customer of Rainbo; and that Rainbo was indeed the presser of the records containing Plaintiff's compositions, Opinion 11; (365a). in the finding the trial judge failed to credit any of the relevant testimony of defendant Brown.

Having found infringement, the court went on to determine the extent of defendants' liability in light of the incontroverted testimony of the distribution and sale of phonograph records by plaintiff prior to copyright registration and the filing of the required notices of use. Judge Gurfein held that plaintiff's authorization of the mechanical reproduction and distribution of her unpublished (not printed in sheet music form) compositions did not divest the author of her common law rights and did not cast the works into the public domain. Plaintiff was allowed to recover damages from the dates of her filing the respective notices of use. Opinion 25; (379a). In accordance with that ruling, defendants were to account for the period not barred by either the Statute of Limitations or the failure to file notice of use with respect to each record sold of a copyrighted composition of the plaintiff under the labels of Carousel and Playtime, Opinion 29; (383a).

The interlocutory judgment was entered April 12, 1973, ordering that defendants be enjoined from further infringement and appointing Magistrate Martin D. Jacobs special master to take evidence and compute damages. A report was rendered by Magistrate Jacobs dated May 22, 1974 and confirmed by Judge Gurfein assessing damages against defendants in the amount of \$14,300 with interest from July 1, 1964, Judgment 3; (389a).

DISCUSSION OF THE EVIDENCE

A

Jack G. Brown, President of Rainbo Record Manufacturing Corporation ("Rainbo") testified that Rainbo is a record presser, (255a). Mr. Brown testified that in 1960 a partnership consisting of himself, Sidney Taback and Selig T. Smith, was formed under the firm name of Lyric Records. However, the partnership never conducted business. It was informally dissolved shortly after its formation, but formally dissolved in February, 1963, by Mr. Smith, (258a-260a).

Although the partnership Lyric never conducted business Taback used the name Lyric for his own operations. Brown testified that neither he nor Rainbo had an interest in Lyric, or in any business conducted by Taback, including Playtime or Carousel, on whose records plaintiff's copyrighted compositions were recorded, (263a).

Rainbo did some pressing of records at Taback's order and request. At such times Taback would supply the metal parts, mothers, and stampers for Rainbo, and after the records were pressed such material would be returned to Taback. (193a-194a). Brown testified that he did not listen to any of the records Rainbo had pressed for Taback and that neither he nor Rainbo had any interest in the records pressed for Taback, (281a, 292a-293a).

Plaintiff claimed that some of her copyrighted compositions appeared on Playtime album nos. 106, 107, 108, 109, 111, 112, 116, 117 and 118, and on Carousel album nos. 806, 807, 808 and 812. Brown testified that the only pressing of records he did for Taback which contained any of plaintiff's compositions, was a small quantity of Playtime album number 106, which was pressed in 1960 (281a-283a). Brown further testified that Rainbo also pressed some other Playtime records for Taback. Some of these records contained children's songs owned by Rainbo, which were songs other than those owned by plaintiff, although there were some titles similar to those copyrighted by the plaintiff, (279a-280a).

To avoid any misconceptions, it was testified to at some length by both plaintiff and Brown that many of plaintiff's copyrighted songs contain titles of classic children's nursery rhymes which are either in the public domain or which may be owned by others, (150a-151a).

Plaintiff obtained copyrights to her songs because of her adaption, arrangement and some original lyrics for these nursery rhymes, (97a). However, there are many other recordings of the same titles which do not contain plaintiff's adaption, arrangement and lyrics, and thus do not constitute an infringement. Thus, by merely looking at the titles of Plaintiff's compositions, it is impossible to tell if those are compositions which were copyrighted by plaintiff, or if they are compositions in the public domain or owned by others. The only way of determining this source of ownership of the compositions is by listening to them.

There are many different recordings of the children's classic "Mary Had a Little Lamb". Most of these recordings are of the standard tune and lyric which is in the public domain. However, plaintiff was able to copyright her composition containing this same title (Count 27) only because of her arrangement of this song, which contained her own original lyrics and dialogue. As noted above, Rainbo's catalogue of children's songs does not include any of plaintiff's copyrighted compositions, although some of the titles are the same.

The foregoing is important because it explains the confusion which might arise from a reading of plaintiff's claim letter dated May 17, 1966 sent by her attorney, Mr. Couture of Zissu, Marcus, Stein and Couture, to Playtime Records, and Rainbo's response to that letter dated June 16, 1966.

On May 17, 1966 Mr. Couture wrote to Playtime Records, Inc., claiming an infringement of certain titles of compositions copyrighted by plaintiff which appeared on Playtime and Carousel Records.

Apparently, the address to which the letter was sent was also Rainbo's address. The letter was delivered to the Rainbo office, although, as Mr. Brown testified, Rainbo had no relationship with Playtime Records, Inc., (281a). Plaintiff's Counsel's letter demanded that Playtime cease and desist in any and all sales, distribution or exploitation of certain Carousel and Playtime phonograph records which embody the compositions specified in his letter.

Mr. Brown testified that Mr. Taback, who owned the Playtime and Carousel line, died in about 1963, and he believed that the Playtime and Carousel lines were inactive since that time. Mr. Brown said that his secretary opened the letter addressed to Playtime Records and gave him the letter together with his other mail, (301a-302a). Upon reading the letter he believed that claim was being made against some of the songs owned by Rainbo which had been released on the Carousel or Playtime labels.

By letter dated June 16, 1966, Mr. Brown advised Mr. Couture that the Rainbo line might be reactivated through PPX, as follows:

"We may reactivate the line through Ed Chalpin of PPX, with whom I'm sure you are familiar."

Since Mr. Brown wanted to make sure that the Rainbo recordings did not infringe on any of plaintiff's compositions, he asked to see plaintiff's contracts regarding the songs Plaintiff's Counsel referred to in his letter because the contracts under which Rainbo acquired its catalogue of songs contains a "hold harmless" clause.

Plaintiff misconstrues the June 16, 1966 letter from Rainbo by claiming that Mr. Brown was referring to the Carousel and Playtime catalogue of songs, and not the Rainbo Catalogue.

Plaintiff is apparently attempting to show, by this letter that Rainbo had a proprietary interest in Playtime. She does so because she knows that Playtime has not conducted business since Taback died, and plaintiff has no other party to proceed against on her infringement claim.

Further, if Rainbo was merely a record presser for Taback, then Rainbo would not be liable as an infringer. Accordingly, plaintiff improperly sought to make it appear that Rainbo had an interest in Playtime Records.

The fact is, however, that neither Rainbo nor Mr. Brown were associated with Playtime, Carousel, Lyric, or any other company with which Taback was associated, as was testified to by Mr. Brown, (258a-264a).

It will be recalled that Rainbo recordings appeared on Carousel and Playtime, and that some of the titles of these recordings were similar to those titles referred to in Plaintiff's Counsel's letter.

In the first paragraph of his letter, Mr. Brown advises that the Carousel and Playtime record line (which contained Rainbo's recordings) were inactive for two years. Since Carousel and Playtime were inactive, Rainbo's recordings appearing on Carousel and Playtime were also inactive. The second paragraph advises that "we" -- Rainbo, may re-activate its line through PPX. The third paragraph refers to Rainbo's purchase of its catalogue.

Plaintiff incorrectly assumes that the last paragraph which says "... when we purchased the entire Catalogue" refers to the Carousel and Playtime Catalogue. This conclusion is unwarranted.

The paragraph does not refer to a purchase of the Carousel and Playtime Catalogues, it just refers to the purchase of a Catalogue. In fact, the reference was intended to mean the Catalogue of songs that Rainbo purchased from others, which as Mr. Brown testified to, included songs sung by the Sons of the Pioneers, and some of the songs in the Rainbo Catalogue which appeared on Record Guild of America records, (271a).

Further, although it is not true, let us assume for the sake of argument, that Rainbo did purchase the Carousel and Playtime line. Even if it did so, plaintiff failed to show when this alleged purchase was made; and failed to show that Rainbo manufactured, sold, or had anything to do with any records containing plaintiff's songs.

Accordingly, since plaintiff has completely failed to show any proprietary relationship between Rainbo and Playtime and Carousel, or any relationship at all, except that Rainbo pressed some Playtime records for Taback in 1960, if there is any liability on the part of Rainbo it is as a presser and not as a manufacturer.

B

The plaintiff in this action was involved in a prior lawsuit against a company called Crown Records. Her action against Crown was commenced sometime prior to November, 1966. The issue involved in the Crown lawsuit was virtually identical to that of this action.

Plaintiff claimed that Crown had infringed virtually the same copyrights involved here, (79a).

At the time of this trial, counsel for defendants was newly appointed as trial counsel and had had no opportunity to conduct adequate discovery. It happened that he was able to uncover the Crown file in the federal warehouse and was able to examine the various defenses that had been raised by Crown Records. One of those defenses was that in 1953 Junior Records, plaintiff's company at the time, had pledged certain tapes and songs and masters, mothers and stampers to a company called Whitehall Mercantile Company and that subsequently Whitehall foreclosed a lien on these materials used in the manufacture of phonograph records and plaintiff had signed an assignment of these materials and musical compositions to Whitehall giving Whitehall and its assignees the right to use these very compositions that are the subject of this lawsuit, (344a-19).

Thereinafter Whitehall assigned its rights under the agreement with plaintiff to Aaron Eichler (347a-1) granting Eichler the right to manufacture and sell these compositions. Eichler in turn assigned these compositions along with the record manufacturing materials to Sidney Taback, (354a-12). Sidney Taback hired Rainbo Record Manufacturing Company to press these records, (80a).

Trial counsel for Rainbo argued that if Mr. Taback had the authority granted by Mr. Eichler, "who received it from Whitehall, who received it from Mrs. Rosette, then Rainbo had an absolute right to press these records without any infringement," (80a).

Based upon this newly discovered information and upon the original documents tracing the chain of title to the musical compositions which are the subject of this action, Counsel for defendants made a formal motion at trial to amend the answer in order to raise new affirmative defenses, (80a).

Plaintiff was fully aware of the defenses which we sought to raise. Although the above-mentioned lawsuit between plaintiff and Crown Records did not go to trial but was settled, extensive discovery was conducted. Interrogatories were served upon plaintiff, Exhibit A-1, (344a-1), which were fully answered by plaintiff, Exhibit A, (344a-6).

Other facts were offered by plaintiff in support of the motion to amend. There was another lawsuit commenced by Aaron Eichler against plaintiff, her husband, Junior Records, Inc., and other companies they were associated with in 1960, (354a-3). Eichler alleged that the record manufacturing materials and the musical compositions which Eichler purchased from Whitehall had been improperly used by Junior Records, (82a).

There was a settlement made in open court under which it was agreed that Mr. Eichler had the absolute right to those materials, Exhibit G, (348a).

Although Defendant made the formal motion to amend at trial, Judge Gurfein was informed of the content of the new evidence and of the request for amendments by letter, twenty-five (25) days before trial. However, defendant received no response to the request, (90a).

With regard to the proposed amended answer (67a) the trial court ruled to allow the First Defense - "The complaint does not state a claim upon which relief can be granted." The reason the court allowed it was that it stayed within the realm of the original answer and the pre-trial order, (88a). The Second Defense concerning the Statute of Limitations was allowed because it too was within the general statement of the pre-trial order. Since the Third Defense was similar to the Second, the court allowed it. The Fourth Defense was not allowed for the reason that according to Judge Gurfein it could not be an affirmative defense but could be raised through cross-examination. The Fourth Defense concerned prior publication and dedication of the compositions to the public. The Fifth Defense was virtually the same as the Fourth and also not allowed. The court allowed the Sixth and Seventh Defenses dealing with plaintiff's failure to file notices of use.

The Eighth Defense was denied because in the trial judge's estimation it would prejudice the plaintiff to meet the defense of a competing claim of title. The Ninth Defense based upon the jurisdiction of the federal court, is allowed. The Tenth Defense was denied for the same reason as the Eighth. The Eleventh Defense was denied because it dealt with the ownership of the copyright in a third person (88a-89a).

The denied amendments were crucial to the outcome of this case. If they had been allowed they and the documentary proof offered to support the defenses would have given Rainbo complete defenses to this action. It may be that Rainbo may be liable for copyright royalties. Rainbo admittedly has paid none. Nevertheless, Rainbo cannot be guilty of infringement of compositions to which it had contractual rights.

Whitehall Mercantile Company and Aaron Eichler its assignee, had both real and apparent authority from both Junior Records, Inc. and plaintiff to sell to and license Sid Taback to utilize the masters and tapes and musical compositions in the production of records, and to sell them. Plaintiff is estopped from denying the authority of Whitehall Mercantile Company and/or Aaron Eichler to have authorized Sid Taback to use the materials. Therefore, Rainbo had the absolute right without infringement to press phonograph records containing the musical compositions for Taback.

ARGUMENT

POINT I. The trial judge abused his discretion in denying the major portion of defendants' motion to amend the answer.

Rule 15(a) of the Federal Rules of Civil

Procedure provides that:

"if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." (emphasis added)

Thus, the thrust of this rule is that amendments be granted liberally. The function of this rule is to enable a party to assert matters that were overlooked or were unknown to him at the time he interposed his original complaint or answer, Wright & Miller, Federal Practice and Procedure: Civil Sec. 1473. Such was the fact in this action.

It is true that in the case at bar, defendant did not learn the facts he sought to introduce until the eleventh hour. However, this was very shortly after retention of trial counsel, who noting that prior counsel had not properly pursued discovery proceedings was fortunate in uncovering the facts of the two previous cases and the resulting complete defense to plaintiff's suit.

It is also true that plaintiff's counsel was also her attorney on one of the previous suits, Marion Rosette v. Crown Record Co., Inc. 63 Civ 3411 (84a). Reference was made to the pledge by plaintiff to Whitehall Mercantile Corp. in the Interrogatories (344a-1) and the Answer to Interrogatories (344a-6) in that case. The intended Amended Answer should not have come as a surprise to plaintiff and allowance of same could not have been prejudice to plaintiff.

The trial judge, but not the plaintiff, cited resultant prejudice if the new affirmative defenses are to be allowed (87a-89a). But what was the basis of this prejudice? It certainly could not be undue delay. No delay would have occurred in the first instance if the court had acted affirmatively on defendant's letter-motion to amend (which included the proposed Amended Answer), within a reasonable time after submission, which submission was some three weeks prior to the start of the trial. Defendant received no response to this and renewed his motion on the trial date and before the opening.

The amendments, if allowed, would have gone to the very heart of, and would have served as a complete defense to, plaintiff's claim of infringement. In the spirit of Rule 15(a) the discretion of the Court should not be used to thwart sound and reasonable defenses unless clear prejudice can be shown.

FOR THE SECOND CIRCUIT

If other parties to the action can show that prejudice will result by allowing the amendment or that the proposed amendment is totally frivolous leave to amend will be denied. A liberal policy toward allowing amendment clearly is desirable and furthers one of the basic objectives of the federal rules - the determination of cases on their merits. Civil Sec. 1473 West's Federal Practice & Procedure.

The Court of Appeals in McIndoo v. Burnett, 494 F. 2d 1311 (1974) stated:

The trial court recognized that the Rules of Civil Procedure require that amendments be freely granted. Fed. R. Civ. P 15(a). We agree. Pleadings are merely to facilitate a proper decision on the merits. Technicalities cannot be allowed to control the law suit. Foman v. Davis, 371 U.S. 178, 181-182 S. Ct. 227, 9 L. Ed. 2d 222 (1962); Wilburn v. Pepsi Cola Bottling Co., 492 F. 2d 1288 (C.A. 8 1974).

In commenting on the application of these rules, the Supreme Court in Foman v. Davis (supra) stated:

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires" this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), 15.08 - 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given."

Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. (371 U.S. at 182, 83 S.Ct. at 230.).

The Court thus held that the district court as well as the court of appeals erred in denying the motion of the plaintiff to vacate a judgment and file an amended complaint stating an alternative theory for recovery in a civil action. See Also United Steelworkers of America v. Mesker Brothers Industries, Inc., 457 F. 2d 91, 93 (8th Cir. 1972).

The courts have held that under appropriate circumstances, amendments of the complaint may, in a proper case, be allowed after defendant has moved for a dismissal, Murray v. Wagner, 277 F 32; Michelson v. Shell Union Oil Corp., 26 F. Supp 594, after the trial is entered upon, Heay v. Phillips, 201 F2d 220; George v. Wiseman, 98 F2d 923, after the evidence is heard, Ericson v. Stomer, 94 F2d 437; Griffin v. Thompson, 10 F2d 127; Murray v. Wagner, 277 F 32; Afron Fuel Oil, Inc. v. Firemen's Ins. Co of Newark, N.J. 113 F Supp 38, or after verdict, Lyon v. Metropolitan Life Ins. Co., 101 F2d 658; A.C. Motor Freight Lines v. Shingledacker, 70 F2d 827; Johnson v. Crawford & Yothers, 144 F 905.

POINT II. The trial judge erred in finding defendants guilty of infringement where defendants were not manufacturers but were mere pressers.

The reason plaintiff attempted to show that Rainbo was somehow associated with Taback is that an independent record presser which is not associated with the company producing and selling the infringing recording is not deemed to be a "manufacturer" under Sections 1(e) and 101(e) of the Copyright Law. Edward B. Marks Music Corp. v. Foullon, 79F. Supp. 664 (S.D. N.Y. 1948) aff'd 171 F. 2d 905 (2nd Cir., 1949, Leo Feist, Inc. v. Apollo Records, N.Y. Corp., 300 F. Supp. 32 (S.D.N.Y. 1969); aff'd 164 U.S. P.Q. 481 (2nd Cir. 1969).

In Foullon, plaintiff claimed that the subcontracted record presser was a "manufacturer" within the meaning of Section 1(e). The Court, however, dismissed the complaint against the presser, Bard, for the following reasons, 79 F. Supp. at p. 667:

"The reason plaintiff brings defendant Bard in is because it maintains that Bard is a "manufacturer" within the meaning of Section 1(e) and the other defendants are practically bankrupt.

As has been previously pointed out Bard was the last instrumentality in a chain of production. In short, United Masters, Inc. was the general manufacturer, and was so considered by the plaintiff.

United Masters, Inc. hired the artists, recording studio, electroplating plant, and finally the pressing outfit.

As early as 1926 owners of copyrights presented to the Congress comparable situations and have requested it not to limit the owners recourse to the general manufacturer where sub-contracting manufacturers are involved and the general manufacturer is judgment-proof. The decision in G. Ricordi & Co., v. Columbia Graphophone Co., D.C., 270 F. 822 was brought to the attention of the Congress, which case held that the various steps taken to produce the stamper were all essential to the manufacturer and that the party who made all the arrangements were deemed to be the manufacturer. See Hearings H.R. 1043 (1926) pp. 284-285 before Patents Committee, Shafter Musical Copyright p. 244. However, the Congress took no action to rectify this alleged shortcoming in the statute; and the court may not legislate."

After the Foullon case was decided, Reeve Music Co. v. Crest Records, Inc., 285 F. Supp. 546 (2nd Cir., 1960) was decided. It concluded that although one must perform a substantial part of the manufacturing process in order to be a manufacturer under Section 1(e), all persons contributing to the manufacturing process are jointly and severally liable as manufacturers for the purpose of Section 101(e), which deals with acts of infringement.

However, Reeve was followed by Apollo, which limited Reeve to its facts. In Apollo, the record manufacturer, Apollo was the general manufacturer and general contractor of the subject recording. It hired the artists, recording studio and pressing plant. The Court dismissed the complaint against Mastertone, the company which recorded, edited and prepared the master tapes for Apollo, which Apollo used for the manufacture of the offending recordings. The Court reviewed the Foullon and Reeve cases, and said, 300 F. Supp. at p. 43:

"In G. Ricordi & Co. v. Columbia Graphophone Co., 270 F. 822 (S.D.N.Y. 1920), the District Court affirmed a determination by a Special Master that the various steps taken to produce a record stamper were all essential to the manufacturer and that the party who made all the arrangements was deemed to be the manufacturer. In Edward B. Marks Music Corporation v. Foullon, 79 F. Supp. 664 (S.D.N.Y. 1948), aff'd 171 F. 2d 905 (2nd Cir. 1949), the District Court dismissed the complaint of a musical copyright owner against the record pressing company on the grounds that such a sub-contractor was not a "manufacturer" within the meaning of 17 U.S.C. Civil Sec. 1(e). In Reeve Music Co. v. Crest Records, Inc., 285 F. 2d 546 (2nd Cir. 1960), the Second Circuit Court of Appeals held that, under 17 U.S.C. Civil Sec. 101(e), the 'manufacture' of records in violation of this statute is an active infringement, that infringement of a copyright is a tort, and that all persons concerned therein are jointly and severally liable as joint tortfeasors.

The court determined, upon the particular facts in the case, that where defendants were affiliated corporations, conducting their operations at the same address, and one of the defendants produced a "master stamper" which the other defendant used to 'press' a number of records, whether or not the separate act performed by each defendant constituted 'manufacture,' the two defendants, acting in concert, 'manufactured' the offending recording within the meaning of 17 U.S.C. Civil Sec. 101(e).

In the present case, as in Edward B. Marks Music Corporation v. Foullon, supra, the general manufacturer, in this case Apollo, hired the artists, recording studio and pressing plant. Apollo did not act 'jointly' or in 'concert' with Mastertone, nor did it conduct a business at a joint address with Mastertone. Apollo was the general manufacturer and general contractor in fact as well as name. Accordingly, on the authority of G. Ricordi & Co. v. Columbia Graphophone Co., supra, and Edward B. Marks Music Corporation v. Foullon, supra, the Complaint and Amended Complaint must be dismissed on the merits as to defendant Mastertone."

In commenting on the Apollo case, Nimmer On Copyright (1971 Ed.) in its 1971 Supplement at p. 54 states:

"Leo Feist, Inc., v. Apollo Records, N.Y. Corp., 300 F. Supp. 32 (S.D.N.Y. 1969), aff'd 164 U.S.P.Q. 481 (2d Cir. 1969), distinguishes Reeve to the point of complete emasculation. It limits the Reeve doctrine to its facts so that one performing an insubstantial part of the manufacturing process will nevertheless be deemed a 'manufacturer' under Sec. 101(e) only if it is an affiliated corporation conducting operations at the same address as the principal manufacturer.

The Apollo court held that an independent contractor which engaged in record pressing in an arms length transaction for another company was not itself a 'manufacturer' under Sec. 101(e)."

In the instant case Rainbo is not a corporation affiliated with either Taback, Playtime, Carousel or Lyric. Further, it never shared an office with either of them. Indeed, as appears from some of the Playtime and Carousel albums, Lyric merely had a Post Office box, and not an office.

Mr. Brown was genuinely surprised that Playtime was listed in the telephone directory at Rainbo's premises. We are unable to explain this listing. It is, of course, possible that Mr. Taback, before he died, listed his company at Rainbo's address and with its phone number. Perhaps the telephone company continued to keep this listing. But this telephone listing, and the fact that Mr. Couture's letter was delivered to Rainbo, is the flimsiest of proof of any association between Rainbo, and Playtime and Carousel.

If there was such an association, or if Playtime or Carousel were in existence after Taback died, plaintiff could have easily demonstrated this by more concrete facts. For example, if Rainbo sold Playtime or Carousel Records, or if it listed Playtime Records in the 1964 Schwann Catalogue (Ex. 13), plaintiff would have easily been able to show this from the business records of the distributors, stores or others to whom the records were shipped or sold, or from the business records of Schwann.

Plaintiff did not produce an iota of evidence or testimony to show that Rainbo ever sold or advertised Playtime or Carousel Records. It did not do so because there never was a relationship between these companies, except for some pressing which was done by Rainbo for Taback. Indeed, Brown testified that he did not know what compositions were on the records he pressed for Taback, and Rainbo also returned back to Taback the metal parts, mothers and stampers used to press the records for him.

Rainbo was clearly an independent company, which merely pressed some records at Taback's request, in return for payment for these services. This is further borne out by Brown's testimony that Taback used other pressing plants to press his records. Certainly, Taback would only have used Rainbo as a pressing plant if there was some relationship between Taback and Rainbo, and there would have been no need to return the metal parts, mothers and stampers back to Taback after the pressing was completed.

Rainbo clearly is not a "manufacturer," and it never sold or participated in the sale of phonograph records containing plaintiff's copyrighted songs.

POINT III. In light of the uncontroverted testimony of the distribution and sale of phonograph records embodying plaintiff's compositions without prior copyright registration, the trial judge erred in finding that plaintiff did not lose common law and statutory copyright protection as to those compositions.

The manufacture and sale of phonograph records by a composer or company authorized by the composer constitutes a publication of the composition, which results in the loss of the composer's common law copyright, and a dedication of the composition to the public.

In Nimmer On Copyright (1971 Ed.), Section 50.2, p. 198-199, the treatise states that:

"... the relatively few courts which have considered the question have almost un-animously determined that public sale or other distribution of phonograph records does constitute a publication and hence a divestment of common law rights in the works recorded. This conclusion is certainly consistent with the common understanding of the term 'copy.' Moreover, it is in accord with the underlying rationale of the publication doctrine. That is, an author in permitting records of his work to be publicly marketed is certainly engaging in a form of exploitation of his work and should therefore be required to seek protection, if at all, only under the limited monopoly concept of the Federal Copyright Act. furthermore, such Federal protection is available provided the conditions precedent to statutory protection are observed. Thus, sale of records will not divest statutory rights in the recorded work if prior to public distribution of the records, a statutory copyright is obtained either by publishing printed copies of the work bearing a proper copyright notice, or by depositing an unpublished manuscript of the work in the Copyright Office."

In Shapiro, Bernstein & Co. v. Miracle Record Co., 91

F. Supp. 473 (N.D. Ill. Ed. 1950) the Court held that the production and sale of a phonograph record constitutes a publication. If a composer permits his composition to be produced on phonograph records and sold sometime before the copyright is obtained, the composer has abandoned his rights to the copyright. On a motion for a new trial, the Court added the following:

"When phonograph records of a musical composition are available for purchase in every city, town and hamlet, certainly the dissemination of the composition to the public is complete, and is an complete as by sale of a sheet music reproduction of the composition. The Copyright Act grants a monopoly only under limited conditions. If plaintiff's argument is to succeed here, then a perpetual monopoly is granted without the necessity of compliance with the Copyright Act.

* * *

"It is my opinion that when Lewis permitted his composition to be produced on phonograph records and permitted those records to be sold to the general public, the common law property in the musical composition did not survive the sale of the phonograph records, and the public sale of those records was a dedication of the musical composition to the public."

Similarly, in McIntyre v. Double A Music Corp., 166 F. Supp. 681 (S.D. Calif. 1958), the Court held that where plaintiff made and caused to be sold for unlimited distribution to the general public phonograph records of his arrangement, this constituted a general publication of plaintiff's arrangement and destroyed whatever rights he had in the arrangement under the common law of copyrights. The Court further said that the general publication of this musical arrangement through its unrestricted sale placed it in the public domain. Thereafter, it was no longer available for statutory copyright, and plaintiff could not have obtained such a copyright.

The Court also said that not only did plaintiff have no cause of action based upon common law copyright by virtue of the publication, but neither did he have a cause of action based upon unfair competition "because having made a general publication of his work, he had no protectable property right which the defendants appropriated. Having elected not to seek statutory copyright protection, plaintiff may not claim a monopoly of a work which he permitted to go into the public domain."

Mills Music, Inc. v. Cromwell Music, Inc., 126 F. Supp. 54 (S.D.N.Y. 1954) followed the rule stated in the foregoing cases.

The Court said:

"The manufacture and sale of phonograph records in this country by a person or corporation duly authorized by Miron would have constituted a publication of his composition. I believe that it would be a publication, capable of destroying his common law copyright. If he had obtained a statutory copyright prior to the manufacture and sale of the phonograph records, the sale of the records would have no effect on Miron's rights, which then would be based on the copyright statute. The weight of legal authority seems to support that view. RCA Mfg. Co. v. Whiteman, 3 Cir., 114 F.2d 86. Shapiro Bernstein & Co. v. Miracle Record Co., D.C., 91 F. Supp. 473."

In the instant case there is no question but that the compositions Chicken Licken (Count 13); Pussy Cat, Pussy Cat (Counts 18 and 19); Mary Had a Little Lamb (Counts 27, 28); Jack and the Beanstalk (Count 23); Pinocchio (Counts 25, 26); Ding Dong Bell (Counts 29, 30); Fiddle Dee Dee (Counts 31, 32); Goosy Goosy Gander (Counts 33, 34); Where Has My Little Dog Gone (Counts 35, 36); Alice in Wonderland (Counts 37, 38); and Old King Cole (Counts 39, 40) were, according to plaintiff's own admission, recorded, manufactured and continuously sold by plaintiff and her company for many years before plaintiff or her company obtained a statutory copyright.

Phonograph records of Chicken Licken and Jack and the Beanstalk were sold to the general public approximately one and one-half years prior to the date on which the copyrights were obtained, and the copyrights for Pinocchio, Mary Had a Little Lamb, Ding Dong Bell, Fiddle Dee Dee, Goosy Goosy Gander, Where Has My Little Dog Gone, Alice in Wonderland and Old King Cole, were obtained between ten and thirteen years after the recordings of these compositions were sold throughout the United States by plaintiff and her companies.

The manufacture and sale of these compositions by plaintiff and her company before obtaining copyrights therefore constituted a publication. Plaintiff's common law copyright in these compositions was thus destroyed, and the compositions were dedicated to the public.

It should also be noted that with respect to the compositions Monkey Who Wanted to Fly (Count 6); Hobbledy Horse (Count 8); The Weez Wump (Count 14); The Pied Piper (Count 15); and Little Red Hen (Count 20), plaintiff was unable to state when these compositions were first reproduced on records and sold to the general public.

She claimed that she did not have any information which would show the release date of recordings containing these compositions. Since there are so many compositions which are the subject of this action where the recordings were made and sold long before copyrights were obtained, a presumption arises that the copyrights in these five additional compositions were also obtained after records containing these songs were sold to the public.

CONCLUSION

The judgment in favor of plaintiff-appellee should be reversed and the Complaint dismissed. Upon the evidence sought to be introduced at trial defendant had the right to press the phonograph records containing plaintiff-appellee's musical compositions.

The judgment in favor of plaintiff-appellee should be reversed and the complaint dismissed for the reason that defendants-appellants were mere pressers and not liable to plaintiff-appellee as manufacturers.

With respect to those compositions which were published by plaintiff or pursuant to her authorization prior to registration of copyright the judgment should be reversed and the Complaint Dismissed.

OF COUNSEL:
MILTON I. ROTHMAN

RESPECTFULLY SUBMITTED
WALTER HOFER, ESQ.

**COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MARION ROSETTE,

Plaintiff-Appellee,

- against -

**RAINBO RECORD MANUFACTURING CORP.
Etal.,**

Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

ss.:

I, Victor Ortega, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 16th day of June 1975 at 270 Madison Ave, N. Y., N. Y.

deponent served the annexed Papers

upon

Zissu Marcus Stein & Couture

the Attorneys in this action by delivering ² true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 16th
day of June 1975-

Robert T. Brin

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977